No. 18415

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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RALPH CHARLES KAUFMAN, *et al.*,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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### I.

### Jurisdictional Statement.

On March 14, 1962, the Federal Grand Jury for the Southern District of California returned an indictment in one count charging the appellants Ralph Charles Kaufman and Jack Harry Edwards, and their co-defendant Yokoma Foya Conner with the crime of robbery of a national bank and the use of dangerous weapons in the perpetration thereof in violation of Title 18 of the United States Code, Section 2113(a)(d). [C. T. 2-3.][1] Following the arraignment of the appellants and their entry of not guilty pleas on May 14, 1962, a Notice of Motion to Reduce Bail was filed upon behalf of the appellants on June 19, 1962. [C. T. 4-7, 30a and 30b.] An Opposition to the Motion for Re-

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[1]C. T. refers to Clerk's Transcript of Record.

duction of Bail was filed by the Government on June 25, 1962, and on the same date the Honorable Myron D. Crocker heard the motion and denied it. [C. T. 8-11.]

The defendant Yokoma Foya Conner entered a guilty plea prior to trial. On August 15, 1962, a jury was selected, empaneled and the trial commenced. [R. T. 4.][2] The trial continued to August 17, 1962, when a guilty verdict was returned as to both appellants.

On August 28, 1962, the appellants were present with their attorney in the courtroom of Judge Crocker and, following argument by counsel and statements by Kaufman and Edwards, both of the appellants were sentenced to the custody of the Attorney General for a period of 20 years. [C. T. 22, 23.] On October 22, 1962, the trial court reduced the sentences in order to make the appellants eligible for parole at any time pursuant to Title 18, United States Code, Section 4208(a)-(2). [C. T. 30(a) and 30(b).]

A timely Notice of Appeal was filed by Kaufman and Edwards on September 5, 1962. [C. T. 24, 25.] The appellants then applied to the District Court for an order permitting an appeal *in forma pauperis* and this petition was acted upon favorably on September 24, 1962. [C. T. 27-30.]

The jurisdiction of the United States District Court was conferred by Section 3231 of Title 18, United States Code. The power of the Court of Appeals to review the aforementioned proceedings is set forth in Title 28, United States Code, Sections 1291 and 1294.

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[2]R. T. refers to Reporter's Transcript of Record.

## II.

## Statement of the Facts.

Ira Todd Bailey was employed as a teller at the First Western Bank and Trust Company, Mayfair Center Branch, Fresno, California, in 1956. [R. T. 123.] Late in that year Bailey was drafted and subsequently was stationed at the Oakland Naval Air Base in Oakland, California. While serving at the Base, Bailey became interested in tatooing, and in September of 1957 visited the shop of a tatoo artist on San Pablo Boulevard in Oakland, this artist was appellant Ralph Charles Kaufman. [R. T. 125.] In the succeeding eight months the serviceman visited the tatoo parlor on some thirteen occasions in order that he might be tatooed. [R. T. 130.] During these meetings the two men engaged in conversation relative to their backgrounds and, as time passed, Kaufman directed the talk more and more to Bailey's banking experience, to include the operation of the Mayfair Branch and his impression of what would occur should there be a robbery. [R. T. 127, 129, 133-135.]

In the spring of 1958, Kaufman informed Bailey that he and several men from the East intended to rob the Mayfair Branch and that Bailey would be financially taken care of after Kaufman's plan had been effected. [R. T. 137.] Subsequent to the robbery on July 8, 1958, appellant Kaufman met with Bailey in the industrial district of Oakland and gave Bailey $3,000 in currency for the information which he had furnished. [R. T. 142-144.]

As related, Kaufman's plan to rob the bank at Fresno reached fruition on July 8, 1958. On the previous night the defendant Conner had driven a moving van

from Sacramento to Fresno, the van to be used as a get-away vehicle. Conner parked the van some distance from the bank and joined Kaufman and Edwards in a panel truck which had been purchased for use in executing the robbery. [R. T. 213, 215.] The following morning the three men utilized the panel truck in driving to the bank. When they arrived at the bank, they parked in a stall at the rear and waited for an employee to appear for the morning's work. [R. T. 216.] At 8:20 a.m. Marilyn Martin, a bank secretary, approached the rear door of the bank and placed her key in the lock to the back door. At the time Kaufman exited the panel truck and moved quickly to the side of the secretary. He placed a gun to her back, informed her that a robbery was in progress, and demanded admittance to the bank. [R. T. 65, 66, 216.] Kaufman and his confederates, Edwards and Conner, then gained entrance via the rear door.

Once inside the bank, the robbers held the secretary and another early arrival hostage and waited for the remaining employees to appear. As each did appear, he was met by one bandit and later bound hand and foot by the other bandits. [R. T. 68, 82, 100, 113.] By 8:35 a.m. all but one of the bank's employees had arrived. The defendants then inquired of the bank officers as to the identity of the employees able to open the safe. [R. T. 83, 104.] Upon receiving the requisite information, the assistant cashier and another employee were released and directed to open the safe. [R. T. 114.] Edwards, Conner and Kaufman then removed $46,200 in currency from the safe, rebound the two employees, left by the rear door with the money and perfected their escape. [R. T. 84, 217.]

## III.

## The Trial Court Did Not Commit Prejudicial Error in Denying the Motion of the Appellant Kaufman for a Reduction of Bail.

The claim of the appellant Kaufman that he was prejudiced in the preparation of his defense when the trial court denied his Motion for a Reduction of Bail is legally without merit.

> ". . . The determinations of what bail to grant, if any, are peculiarly one for the exercise of discretion after hearing. . . ."
>
> *Petition of Johnson* (1952), 72 S. Ct. 1028, 1031, 96 L. Ed. 1377;
>
> *Connley v. United States* (9th Cir. 1930), 41 F. 2d 49.

Since this exercise of discretion by the District Court is appealable, *Stack v. Boyle* (1951), 72 S. Ct. 1, 342 U. S. 1, 96 L. Ed. 3, the appellant Kaufman had to comply with the provisions of the Federal Rules of Criminal Procedure, Rule 37(a)(2), which provides that the time within which an appeal may be taken is ten days; inasmuch as he did not, the appellant may not now question the amount of the bail. *United States v. Robinson* (1960), 80 S. Ct. 282, 361 U. S. 220, 4 L. Ed. 2d 259. As stated in *Hewitt v. United States* (8 Cir. 1940), 110 F. 2d 1, at page 6:

> "The defendant contends that the court fixed bail in an excessive amount. The ruling of the court below upon the application for bail was not a ruling made during the trial, and the application for bail was no part of the trial . . . Orders fixing bail are reviewable, but not upon an appeal from a judgment of conviction."

Having determined that the question of the amount of bail is not now before this Court, the issue then becomes whether the inability of the appellant Kaufman to make bail is in itself a prejudice to his fundamental rights.

The proposition that the *de facto* denial of bail deprives a defendant of the necessary investigation to prepare his defense is not a question of first impression. Justice Douglas in the recent case of *Bandy v. United States* (1960), 81 S. Ct. 197, 198, stated:

> ". . . The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences . . . In prison, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is necessary for the fullest use of his right of appeal."

Despite this recognition of a very real problem, the Justice did not hold that there had been error and his reason for so holding was expressed earlier in the opinion when he said at page 197:

> "This traditional right to freedom during trial and pending judicial review has to be squared with the possibility that the defendant may flee or hide himself. Bail is the device which we have borrowed to reconcile these conflicting interests. 'The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court.' *Reynolds v. United States,* 80 S.Ct. 30, 32, 4 L. Ed. 2d 46."

In other words, this question is a pragmatic one in which the right of the individual must be weighed

against that of a community and if the accused is unable to post the requisite bond he should give heed to the words of the Court of Appeals for the Second Circuit which, in a *per curiam* opinion joined in by Judge Learned Hand, stated:

> "A person arrested upon a criminal charge, who cannot give bail, has no recourse but to move for trial . . ."
>
> *United States v. Rumrich* (2 Cir. 1950), 180 F. 2d 575, 576.

## IV.

## The Evidence Sustained a Finding of Guilty as to the Appellant Edwards.

In his brief the appellant Edwards does not appear to contest the fact that he participated in the robbery with which we are here concerned; rather, he claims there was insufficient evidence relating to his use of a gun in the robbery. Keeping in mind that at this stage of the proceedings the evidence must be viewed in a light most favorable to the prosecution, *Glasser v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680; *Williams v. United States* (9 Cir. 1961), 290 F. 2d 451; *Robinson v. United States* (9 Cir. 1959), 262 F. 2d 645, we turn to the evidence which does indicate that the appellant Edwards did have a gun.

The codefendant, Yokoma Foya Conner, testified that when the employees were accosted as they entered the bank, he, Conner, was sitting on the floor as he was suffering from a "heart spasm." [R. T. 217.] He further stated that the appellant Kaufman met the employees and sent them to the appellant Edwards who directed them to sit in a chair. [R. T. 247.] Charles

Shelton, who was the comptroller-treasurer of the branch at the time of the robbery, testified that after he was confronted by the first gunman he was directed ". . . back to another man with a gun in his hand, who ushered me to the middle of the bank and asked that I be seated and face the wall." [R. T. 113, lines 20-22.]

Certainly this evidence is sufficient to sustain the jurors finding that the appellant Edwards, the man directing the employees to chairs, utilized a gun in the commission of the robbery of the Mayfair Branch of the First Western Bank and Trust Company.

Additionally, there is extensive testimony from which a jury could find that at least one gun was utilized in carrying out the bank robbery. [R. T. 66, 70, 81, 83, 100, 113, 216, 217, 222, 230, 243, 244, 245, 247, 250.] In an analogous fact situation and faced by a similar argument, the Third Circuit held:

> "The point made is too tenuous to sustain a reversal of the judgments of conviction on the first three counts. We view Bux as a principal in the commission of the crimes and conclude that he was properly charged with the commission of the substantive offenses. . . ." *United States v. Bux* (3 Cir. 1958), 261 F. 2d 807 at 808.

This position is sustained by Title 18, United States Code, Section 2(b), which states:

> "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

## V.

## Conclusion.

On the facts in this record and the law applicable thereto, for the reasons stated herein, the judgments entered against appellants, Ralph Charles Kaufman and Jack Harry Edwards, are free from error and should be affirmed.

Respectfully submitted,

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## Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

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